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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

95-59
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In the matter of)	
IB Docket No. 95-59)	
Preemption of Local Zoning Regulation)	DA 91-577
of Satellite Earth Stations)	45-DSS-MISC-93

COMMENTS OF
COUNTY OF BOULDER, STATE OF COLORADO

The Board of County Commissioners of the County of Boulder, State of Colorado, by and through H. Lawrence Hoyt, Boulder County Attorney, hereby comments as follows:

The Board of County Commissioners of the County of Boulder, State of Colorado (hereinafter the "Board"), is the governing body of said County, a political subdivision of the State of Colorado. Pursuant to the constitution and statutes of the State of Colorado, the Board is vested with authority and jurisdiction to regulate the use of land within its unincorporated geographic limits. As will be shown below, the Board has exercised this authority and jurisdiction comprehensively, and, pursuant to a comprehensive plan, has adopted a Land Use Code which regulates, *inter alia*, the placement of satellite dishes of all sizes on property within the County.

The Board has also taken action for many years, including the current year, to ensure that the County is a constituent member and active in the affairs of the National Association of Counties (NACO.) NACO has appeared in front of the Commission and has made

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comments on behalf of its member counties in connection with the above-entitled matter. Thus, the Board has been represented in this matter.

As noted above, the Board has adopted comprehensive land use regulations, as the Boulder County Land Use Code (hereinafter the "Code".) The Code addresses satellite dishes under the general category of "telecommunications facility". A satellite dish is a "telecommunications facility", which the Code at §4-514(I) (see attached Exhibit A), permits in all zone districts as a use by right, so long as it is going to be placed upon and supported by an existing, legally permitted structure, and so long as the dish, as so placed, will not exceed the applicable district height limitation. Also, implicit in the treatment of satellite dishes in this section is the requirement that they not be located within the lot's required setbacks.

For satellite dishes which are going to be placed upon or supported by a new "structure", as defined in the Code, or which, upon location will exceed the applicable height limitation, persons seeking to locate such telecommunication facilities on their property are required, pursuant to §4-514(J) of the Code (see attached Exhibit A), to obtain approval of a special use permit. The special use permit is approved pursuant to guidelines set forth in §4-600, and in particular, §4-602(D) of the Code (see attached Exhibit A.)

The Commission's Order and regulations in this matter overreaches well beyond that which is necessary to accomplish the

Commission's declared objective, i.e. to ensure easy access to satellite-delivered services through rapid and inexpensive antenna installation. Despite the Commission's declared finding to the contrary, the Order and regulations do not avoid excessive federal involvement in local land-use issues.

It has long been recognized that local governments play an important role in the orderly development of their communities. Moreover, it is only through local government action that the needs and desires of that community, as distinguished from the nation as a whole or any national or international industry, can be effectuated.

The local land use regulatory process is the mechanism by which local governments are able to bring the objectives of the local citizenry to fruition. Traditionally, such regulations have served a number of general categories of goals which protect the public health, safety and welfare. Although the Commission's regulations adopted in this matter relegate "aesthetics" to a secondary position among these goals, in many community contexts, "aesthetics" is one of the primary local values expressed in land use regulations.

This is now and has long been the case in Boulder County, Colorado. Perhaps due to the impressive natural setting, which includes plains area communities at the foot of the Front Range of the Rocky Mountains, together with the foothills and mountainous areas leading up to the Continental Divide, forming the western boundary of Boulder County, the local population values the scenery

and vistas which in so many ways define this area.

Protection of the vistas of individual property owners and the view corridors of whole communities has thus assumed primacy in the legislative and administrative governance of land use in Boulder County. The County's Land Use Code limits all structures in all districts to a height of 50 feet, and zone districts limit heights to 35 feet. It is only because of the Commission's previous Order in the Docket designated "PRB-1" that potential variance of this height limitation is provided, and in the absence of such federal mandate, the local resolution of competing values would be assured by the maintenance of such height limits.

Boulder County's commitment to enforcement of height limitations, preserving the scenic beauty of the area, while recognizing legitimate and reasonable federal telecommunication interests, is demonstrated in its previous actions under PRB-1, as reported in *Evans v. Board of County Commissioners*, 994 F.2d 755 (10th Cir. 1993). In this case, the Court quoted the district judge who had heard the first appeal of the ham radio operator plaintiff, concerning the special value of the view in this area:

[There are] some very specific interests of Boulder County in general...which affect this case.... First of all, Boulder County in general is an unusual county...because it has an unusual panoramic view. And a lot of the people who live in Boulder are very concerned with the view...people that live on the slope of Davidson Mesa looking to the west have a view which is probably one of the greatest views on the eastern slope...people buy in that area because of the view. This is one of the most important considerations of living in that area...where people buy lots for the view in such an area...devaluation of property may occur where the view actually is affected.

994 F.2d at 757, quoting *Evans v. Board of County Commissioners*,

No. 87-Z-1595 (D.Colo. 1988) (unpublished opinion).

The well-established law in the state of Colorado is that preservation of an area's aesthetic qualities is a legitimate public purpose, and this purpose may be served by land use regulations imposing height limitations for preservation of views and scenic vistas. *Landmark Land Co., Inc. v. City and County of Denver*, 728 P.2d 1281 (Colo. 1986). In that case, the Colorado Supreme Court held, citing *Berman v. Parker*, 348 U.S. 26 (1954), that protection of aesthetics, as a primary or even sole objective of a land use regulation, was an appropriate local government role. The Court went on to hold that "(e)specially in the case of Denver - a city whose civic identity is associated with its connection with the mountains - preservation of the view of the mountains...is within the city's police power." 728 P.2d at 1285.

Therefore, given the strong local interest in aesthetic preservation, and the multi-variant settings, needs and desires of the counties and communities nation-wide, the Commission's action, establishing yet another blanket preemption on local government land use regulation in favor of yet another international industry, is unwarranted and unwise.

The Commission's Order, establishing regulations which amend Section 25.104, creates a two-tiered preemption. With respect to satellite dish antennas which are within the specified diameters (1 meter for residential, 2 meters for other districts), there is a stringent presumptive preemption imposed. For antennas which exceed these diameters, a general preemption is imposed, and the

burden of proving the reasonableness of the local zoning regulation is placed upon the local government in order to overcome the preemption.

One of the primary problems with this preemption order, as with many actions which attempt to address an issue on a nationwide basis, is the imposition of a single standard as "one size fits all" where widely variant local conditions, interests, values and regulations are involved. As an example, the reasonableness of the regulation, necessary to overcome the general preemption, can be established only where two express criteria are met, one of which imposes a mandate related to the text of the local regulation itself. As a result, the thousands of local land use regulatory jurisdictions in the nation will be required to convene countless public hearings in order to legislate anew their local regulations, which do not contain the "magic words" now required of them by Commission action.

A perusal of the County's Code sections addressing telecommunication facilities will reveal that the required magic words are not contained therein. General statements regarding the intent of the Code as a whole to preserve views and other aesthetic values are contained in other, generally applicable sections of the Code, but the action of the Commission does not make clear whether this is sufficient.

Regarding the presumptive preemption related to the diameter of the dish, Boulder County has found that size is generally not what counts; rather it is the manner in which it is used, and the

place where it is located which are important. The presumptive preemption portion of the regulation, Section 25.104(b), creates a significant problem for Boulder County, and, presumably, others. It precludes any consideration of aesthetics in rebutting the presumption, but as shown above, preservation of aesthetics should not be treated differently from other legitimate local government regulatory goals.

Of even greater concern is the fact that this portion of the regulation does not distinguish between the satellite dish itself and the supporting structure(s), whatever they may be. It does not limit its preemption to exclusionary land use regulations, so presumably will be argued by industry groups to also preempt application of otherwise generally applicable regulations such as height limitations and structural setbacks.

Structural setbacks certainly serve fire protection and traffic safety, as well as other health and safety, and aesthetic, goals, and may be readily sustainable under this preemption. However, other limitations, such as upon placement of accessory structures in front yards, serve primarily aesthetic goals, precluding a cluttered appearance in neighborhoods, both residential and commercial. These limitations, although basic to the creation of an orderly community, are not even eligible for survival under the presumptive preemption which is imposed here.

Height limitations in particular will be vulnerable to this preemption, since they are less likely to be sustained on a purely health and safety basis. Although the limitation on size of the

antennas which qualify for this preemptive treatment is helpful, incursions of antennas into the hitherto pristine airspace above generally applicable structural height limits will cause substantial degradation in Boulder County's ongoing effort to preserve scenic views and mountain vistas.

Yet what does this preemption approach serve. It is ostensibly necessary for "...ensuring easy access to satellite-delivered services..." through "...rapid and inexpensive antenna installation...." Commission Opinion, p. 1, March 11, 1996. Yet there has been no showing that this goal is furthered by a blanket preemption of height limitations, and logic would indicate that there is no necessary relationship between the preemption and the goal quoted above.


Most satellite dish antenna, whether receive-only or transmit and receive, simply need a direct line of sight up to the serving satellite. Incursion into the area above the general height limit of a district is not going to be necessary for 99% of the proposed locations. Utilizing the general preemption found in Section 25.104(a) for these antenna, but imposing an ultimate preemption where the proposed owner/user has no reasonable alternative as to placement of the antenna, would promote the federal interest without so severely impacting legitimate local prerogatives.

For the above reasons, the Board of County Commissioners of Boulder County requests reconsideration of the action of the Commission in this matter. Of critical importance is revision of Section 25.104(b), as suggested hereinabove.

Filed by hand-delivery to the Office of the Secretary, Federal Communications Commission, 1919 M St., N.W., Washington, DC, 20554, on the 15th day of April, 1996.

**Board of County Commissioners
of the County of Boulder,
State of Colorado**

BY:


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- (3) Parking Requirements: To be determined through special review
 - (4) Loading Requirements: *None*
 - (5) Additional Provisions:
 - (a) This use is not required to be located on a building lot, or comply with the minimum lot size requirement for the district in which it is located.
- (I) Telecommunications Facility, utilizing an existing structure and meeting the height requirements of the district in which the facility is located
- (1) Definition: A facility used for the transmission or reception of electromagnetic or electro-optic information, which is placed on an existing structure and meets the height requirements of the district in which it is located. This use does not include any other use listed in this Code, devices not used for communication, or radio frequency machines which have an effective radiated power of 100 watts or less.
 - (2) Districts Permitted: By right in all districts
 - (3) Parking Requirements: *None*
 - (4) Loading Requirements: *None*
 - (5) Additional Provisions:
 - (a) This use is not required to be located on a building lot, or comply with the minimum lot size requirement for the district in which it is located.
 - (b) A separate accessory equipment building is allowed as long as it is no more than 10% of the gross floor area of the existing structure or 450 square feet, whichever is less.
- (J) Telecommunications Facility, requiring a new structure, an accessory structure, or exceeding the height limitation of the district in which the facility is located
- (1) Definition: A facility used for the transmission or reception of electromagnetic or electro-optic information, which is placed on a new structure, requires accessory structures, or exceeds the height requirements of the district in which it is located. This use does not include any other use listed in this Code, devices not used for communication, or radio frequency machines which have an effective radiated power of 100 watts or less.
 - (2) Districts Permitted: By special review in all districts
 - (3) Parking Requirements: *None*
 - (4) Loading Requirements: *None*
 - (5) Additional Provisions:
 - (a) In addition to the general requirements for approval of a special use permit, telecommunication facilities shall also be subject to the requirements outlined in Section 4-600 of this Code.
 - (b) This use is not required to be located on a building lot, or comply with the minimum lot size requirement for the district in which it is located.
- (K) Utility Service Facility
- (1) Definition: Any electrical distribution lines, natural gas distribution lines, minor gas regulator stations, cable television lines, telegraph and telephone lines, and gathering lines, or other minor service facilities.
 - (2) Districts Permitted: By right in all districts
 - (3) Parking Requirements: *None*
 - (4) Loading Requirements: *None*
 - (5) Additional Provisions:
 - (a) This use is not required to be located on a building lot, or comply with the minimum lot size requirement for the district in which it is located.
 - (b) There may not have be any buildings associated with this use.
 - (c) This use is limited to the following sizes:

BOULDER COUNTY LAND USE CODE Sec. 4-602(D)

within the Comprehensive Plan.

- (d) The development may be approved only if the public benefits are substantial and there will be no significant negative impacts on the quality of life in the surrounding area, and no major negative fiscal, service, environmental, or related land use impacts.
- (e) Construction Plans: Preliminary construction plans for the proposed buildings and preliminary engineering plans for installation of necessary utilities shall be presented prior to approval of a site plan.
- (f) Number of Employees or Residents: An estimate of the maximum number of employees or residents contemplated for the proposed development shall be presented.
- (g) Site Plan: The site plan and accompanying documents as approved by the Board shall be filed with the Director. Location and size of the undeveloped area and siting and phasing of the developed area must be approved as part of the application. The effects of phasing on population increases that may result from an expansion of the employment base shall be considered, along with all other relevant impacts which are likely to result from such siting and phasing.
- (h) Certificate of Occupancy: Prior to the use or change in use of a structure approved through this process a certificate of occupancy shall have been issued by the Building Official. Such certificate shall show that such building or premises and the proposed use are in conformity with the provisions of this Code and with all requirements set forth by official action of the Board in their approval of the site plan.
- (i) A special review approval for a nonurban development shall expire one year after the date upon which it was issued if a site plan for the proposed development is not approved by the Board within that year, or three years after the date upon which it was issued if not more than one-half the floor area of all buildings and improvements shown on the approved site plan has been constructed.

(D) Special Review for a Telecommunication Facility

- (1) In addition to the listing of adjacent owners required as part of the title report submitted with the special review application, the Land Use Staff may prepare a similar listing of all owners and their addresses of real property within one-half mile of the location of the proposed facility. This listing may be used in addition to the adjacent owner list for all referral and notice requirements of Article 3.
- (2) In addition to compliance with those conditions required within or imposed by the Board of County Commissioners pursuant to Paragraph 4-602(A), an applicant seeking special review approval for a telecommunication facility shall comply with the following conditions and requirements:
 - (a) Alternative site and/or design studies provided by the applicant shall show that reasonable consideration has been given to such alternative sites and/or designs and the proposal is the most acceptable alternative to Boulder County.
 - (b) The alternative of consolidation of multiple telecommunication facilities onto a single tower, either by use of an existing tower or moving existing facilities to the proposed tower, shall be studied by the applicant and, when feasible and not otherwise detrimental, shall be considered the preferred alternative.
 - (c) When feasible, telecommunication facilities shall be located adjacent to, on, or incorporated into existing or proposed buildings or other structures.
 - (d) Where a telecommunication system uses a network of facilities, the applicant

shall demonstrate that a comprehensive approach for evaluating potential sites in Boulder County with a view to minimizing the number of sites required and any adverse impact has been taken.

- (e) Proposed landscaping and/or screening shall be in harmony with the character of the neighborhood and compatible with the surrounding area.

(E) **Special Review for a Use of Community Significance**

- (1) A use of community significance is a use which the Board determines to be a use having significant historic, cultural, economic, social, or environmental value to Boulder County, which does not conform to the regulations of the district in which the use is located as a result of either the adoption or amendment of this Code, and which can not be made conforming through any other county discretionary review process.
- (2) A use of community significance may be approved through special review even though it is not in conformance with the Comprehensive Plan, and does not meet the bulk or minimum lot size requirements of the zoning district in which it is located.
- (3) In addition to the standards of approval set forth in Paragraph 4-602(A), a use of community significance must also meet the following:
 - (a) The use does not impair the Goals and Policies of the Comprehensive Plan, considering the nature and history of the use.
 - (b) The use has a significant historic, cultural, economic, social, or environmental value to the inhabitants of Boulder County as a whole, or to a recognized community of interest within the County.
 - (c) The significant community interest served by the use can not be served by the relocation of the use to the nearest zoning district in which it could be permitted by right or by special review, or by the existence or location of similar uses elsewhere in the County.
 - (d) The applicant has obtained, or commits to obtain as a condition of the special review approval, all applicable federal, state, and local licenses or permits, and is in compliance with all applicable federal, state, and local regulations.

4-604 Modification of a Special Review Approval

- (A) No substantial modification of the provisions of a special review approval shall be permitted by the Board of County Commissioners, except upon a finding following review and public hearings held in accordance with the provisions of Article 3 of this Code, that the modification is consistent with the standards set forth in this Section 4-600.
- (B) No activity or use authorized pursuant to an approval granted subject to the provisions of this article shall be permitted or allowed to commence unless a site specific development agreement has been approved pursuant to the requirements of this Code.

4-605 Limitation of Uses by Special Review

- (A) Subject to vested rights, no use by special review shall commence operation or construction later than five years from the date of the Board approval or conditional approval.
- (B) Any use by special review which received Board approval on or before August 28, 1989, shall not commence operation or construction on or after August 29, 1994 without a new discretionary approval under the provision of this Code.